



# Legislative Audit Division

State of Montana

Report to the Legislature

January 2003

## Performance Audit

### Nursing Home Surveys

Certification Bureau, Quality Assurance Division  
Department of Public Health and Human Services

The Quality Assurance Division within the Department of Public Health and Human Services conducts surveys of nursing homes to verify compliance with Medicare and Medicaid program requirements.

This performance audit report provides information about the survey process and presents five recommendations for improving the survey process. Recommendations include:

- ▶ Modifying personnel practices to improve recruitment for and retention of surveyors.
- ▶ Improving the bureau's ability to track and monitor timeliness of surveys, and maximize the use of available resources.
- ▶ Strengthening the bureau's quality assurance program by improving quality control measures and increasing staff supervision.
- ▶ Assuring cited deficiencies at nursing homes are based only on formal regulatory criteria.
- ▶ Improving communication and coordination with the nursing home industry.

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Members of the performance audit staff hold degrees in disciplines appropriate to the audit process. Areas of expertise include business and public administration, statistics, economics, political science, logistics, criminal justice, computer science, and engineering.

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January 2003

The Legislative Audit Committee  
of the Montana State Legislature:

This is our performance audit of the Certification Bureau within the Department of Public Health and Human Services.

This report provides information to the Legislature regarding the nursing home survey process. Nursing homes rely heavily on the Medicare and Medicaid programs to pay for care and services provided to nursing home residents. To be eligible to receive payments from either of these programs, nursing homes must comply with Medicare and Medicaid regulations. The Department of Public Health and Human Services contracts with the federal government to provide surveys, or inspections, of nursing homes to verify compliance with program regulations.


Nursing home surveys provide critical oversight of nursing home activities, and provide assurances nursing home residents receive appropriate care and services. This report includes recommendations for increasing efficiencies in the survey process, assuring cited deficiencies are based on regulations, and improving communication and coordination with the regulated community.

We wish to express our appreciation to department personnel for their cooperation and assistance during the audit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott A. Seacat", with a long, sweeping horizontal line extending to the right.

Scott A. Seacat  
Legislative Auditor



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# **Legislative Audit Division**

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## **Performance Audit**

### **Nursing Home Surveys**

**Certification Bureau, Quality Assurance Division  
Department of Public Health and Human Services**

Members of the audit staff involved in this audit were Jim Pellegrini and Kent Wilcox.



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John Chappuis, Deputy Director

Mary Dalton, R.N., Administrator, Quality Assurance Division

Marjorie Vander Aarde, R.N., Bureau Chief, Certification Bureau



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### Introduction

The Legislative Audit Committee requested a performance audit of the Department of Public Health And Human Services (DPHHS) survey activities of long-term health care facilities. Long-term care facilities, commonly referred to as nursing homes, provide nursing care and services to residents unable to care for themselves or who need higher levels of care than is available outside of nursing home. Most nursing homes in Montana rely upon Medicare and Medicaid funding to provide services to residents. The Certification Bureau within the Quality Assurance Division at the department is responsible for verifying nursing homes in Montana meet Medicare and Medicaid program standards and are eligible to receive Medicare and Medicaid payments. This performance audit focused on Certification Bureau survey activities.

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### Certification Bureau Survey Activities

The Certification Bureau (bureau) conducts two types of surveys: health surveys and life safety surveys. Health surveys focus on nursing home activities related to quality of care, quality of life, resident rights, and facility administration. Health survey activities include observing care provided to residents, observing and examining residents, reviewing resident files and records, and interviewing residents and resident family members about nursing home practices and activities. Life safety surveys focus on structural, mechanical, and life and fire safety issues at nursing homes.

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### Certification Bureau Surveys Provide Critical Oversight of Nursing Homes

The bureau's oversight function provides critical oversight of the care and services provided to more than 7,500 nursing home residents in Montana. The bureau surveys each nursing home least once every 15 months to verify compliance with Medicare and Medicaid regulations. Surveys examine 15 general areas of care and services, ranging from medical care and rehabilitative services to social activities and nursing home conditions.

We reviewed the three most recent surveys of a statistical sample of 24 of 103 nursing homes. At these nursing homes, the bureau cited

## Report Summary

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297 health-related deficiencies, including 37 deficiencies in which the bureau determined one or more residents had been harmed by nursing home practices. Most of the other deficiencies identified had potential for more than minimal harm to residents. In some instances, nursing homes received no deficiency citations or had only minor deficiencies with no potential for more than minimal harm.

Overall, surveys are essential for assuring all Montana nursing home residents receive appropriate care and services, and for improving the nursing home system.

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### Surveyor Qualifications

Federal regulations set minimum qualifications and training requirements for health surveyors. Bureau surveyors meet federal requirements. All surveyors have previous experience working in medical facilities or nursing homes, and many surveyors have at least three or more years of experience in nursing homes. Examples of surveyor backgrounds include geriatric nursing, directors of nursing, mental health, and social work.

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### Bureau Survey Activities Do Not Duplicate Licensure Bureau Activities

All nursing homes must be licensed by DPHHS to operate in the state. The Licensure Bureau within the Quality Assurance Division of DPHHS is responsible for licensing activities. Because of the similarity between state and federal regulations, the Licensure Bureau relies on Certification Bureau survey reports to determine whether nursing homes comply with most state regulations. Consequently, there is no duplication in survey and inspection activities by these two bureaus.

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### Life Safety Surveys Do Not Duplicate Fire Inspections

In addition to examining health-related care and services, federal regulations also require a life safety survey in conjunction with a health survey. Some aspects of life safety surveys are similar to fire safety inspections conducted by state and local fire officials. However, there are significant differences between the surveys and inspections. Nursing homes must comply with the Life Safety Code (LSC) adopted by the Medicare/Medicaid programs, and the Centers for Medicare and Medicaid Services does not accept fire inspections conducted using the state-adopted Uniform Fire Code. Additionally, life safety surveyors typically conduct a more intensive examination

of nursing home fire and safety equipment, building structure, and other life safety factors than fire officials. While state and local fire inspections are also necessary, they tend to focus more on basic fire prevention and protection strategies, evacuation of residents, and familiarizing fire personnel with building designs. Consequently, we noted minimal duplication of activities between LSC surveys and state and local fire inspections.

---

### **Improving Bureau Operations**

Audit work identified five areas for improving bureau operations. These five areas relate to efficiency and effectiveness of agency operations, bureau compliance with federal regulations and guidelines, and communication and coordination with the nursing home industry. The following sections summarize audit findings and recommendations.

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### **Timeliness of Bureau Survey Activities**

Federal regulations require nursing homes be surveyed at least once every 15 months, and the length of time for all surveys average 12 months. The bureau is beginning to fall behind federally required timelines for conducting survey activities. Modifications to bureau personnel recruiting and retention strategies may improve the bureau's ability to recruit and retain employees, thereby reducing staff vacancies and improving the timeliness of surveys.

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### **The Bureau Can Modify its Recruitment and Retention Strategies**

The division primarily recruits and hires registered nurses (RNs) as surveyors, and has had difficulty recruiting and retaining surveyors. A nation-wide shortage of RNs has also affected recruitment and retention efforts. Because bureau surveyor wages are generally comparable to the average wage for RNs in Montana, the bureau could address surveyor recruitment and retention through some changes in bureau activities.

Federal regulations allow and encourage other professionals, such as rehabilitative and therapeutic professionals, social workers, and licensed practical nurses to conduct surveys. By expanding recruitment efforts to include these other professionals, the bureau can increase its pool of qualified applicants.

Additionally, the bureau can implement non-monetary employment incentives to attract and retain qualified persons. One option is



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implementing teleworking for surveyors. The bureau generally requires surveyors to work out of the Helena central office or the Billings satellite office, but surveyor job duties do not typically require surveyors to work out of a central location. Implementing teleworking may make employment more attractive for qualified individuals who do not want to disrupt family and community ties to accept employment in Helena or Billings. Additionally, teleworking and other incentives may increase employee productivity and reduce some operational expenses.

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### **Strengthen Management Information Systems to Improve Operational Efficiencies**

The bureau relies primarily on a manual paper system for tracking and scheduling bureau survey activities. This system has no means for automatically alerting bureau management when nursing homes need surveys or assisting bureau personnel coordinate various activities. In some instances the bureau sent surveyors to nursing homes that were closer to another bureau office, resulting in increased travel time and related costs for survey activities. By implementing an automated management information system, the bureau can increase efficiencies, reduce costs, and increase the availability of staff for direct survey activities.

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### **Some Bureau Citations Are Not Based on Regulatory Criteria**

Federal regulations require deficiency citations be based on regulatory criteria. However, in some instances the bureau cited nursing homes for deficiencies that were not based on regulatory criteria. Additionally, the bureau developed “guidelines” for nursing home smoking policies, which the bureau uses as criteria for citing deficiencies at nursing homes. The bureau did not use the Montana Administrative Procedures Act to formally adopt the guidelines as regulations. Criteria for citing deficiencies must be based on formally adopted regulations to assure the regulated community understands regulatory criteria and can implement practices that comply with regulatory criteria. The bureau should implement practices to ensure deficiency citations are based only on prescribed regulations or laws rather than guidelines.

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### **Communication and Coordination Could be Improved**

The bureau can improve its communication and coordination with the nursing home industry. Interviews with the nursing home industry representatives, nursing home personnel, and a

questionnaire sent to all nursing home administrators indicated the bureau needs to improve its communication and coordination with nursing homes. Primary areas of concern related to the bureau not keeping the industry informed of changes to the bureau's interpretation of regulations and its enforcement practices. Additionally, nursing home administrators expressed concern that the bureau does not provide assistance or suggestions for correcting identified deficiencies or improving facility operations.

The bureau has relied primarily on informal communication and coordination strategies. Audit work indicates the bureau can clarify and increase the structure of its communication and coordination strategies. We recommend the bureau develop methods for improving communication and coordination during the survey process. The bureau should also provide the regulated community with notices and information about regulatory changes, and bureau interpretations and enforcement of regulations.



# Chapter I – Introduction

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## Introduction

The Legislative Audit Committee requested a performance audit of survey activities of long-term health care facilities conducted by the Department of Public Health and Human Services. Long-term care facilities, commonly referred to as nursing homes, provide nursing care and services to residents unable to care for themselves or needing higher levels of care than is available outside of a nursing facility.

Most nursing homes in Montana rely upon Medicare and Medicaid funding. Nursing homes must be certified to participate in these federal programs, and the department is the state agency responsible for verifying nursing homes meet federal program standards.

The Certification Bureau within the Quality Assurance Division at the department is responsible for surveying nursing homes and certifying the facilities for participation in the Medicare and Medicaid programs.

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## Audit Objectives

This audit focused on Certification Bureau processes for verifying nursing homes comply with Medicare and Medicaid program requirements. General audit objectives were to:

- ▶ Determine the role of the bureau in surveying nursing homes.
- ▶ Determine bureau compliance with federal requirements for survey procedures.
- ▶ Examine the efficiency and effectiveness of bureau nursing home survey activities.

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## Audit Scope

This audit provides information about how the Certification Bureau conducts surveys (inspections) of nursing homes to verify compliance with Medicare and Medicaid program requirements. We did not examine other bureau responsibilities, such as surveying home health care programs and hospitals, and the nurse aide training program. We did not examine nursing home licensing activities conducted by the Licensure Bureau within the Quality Assurance

## Chapter I – Introduction

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Division. Our audit work focused on activities conducted between 1999 and 2002.

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### Audit Methodology

To examine the bureau's survey activities, we:

- ▶ Interviewed bureau management and staff.
- ▶ Interviewed nursing home administrators and representatives.
- ▶ Accompanied bureau staff on nursing home surveys.
- ▶ Reviewed bureau files and documentation of survey activities.
- ▶ Observed meetings between the bureau and nursing home personnel related to survey activities.

We also sent a questionnaire to all nursing home administrators asking them about bureau survey and enforcement activities. Seventy-one of one hundred-two administrators responded to our survey. The questionnaire and aggregate responses to questions are presented in Appendix A.

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### Management Memorandum

We sent a management memorandum regarding surveyors accepting gifts from facilities. We noted one instance of surveyors accepting non-monetary gifts offered by a facility administrator. The bureau has no formal policy addressing gifts or other gratuities offered by facilities to bureau personnel. The gifts were valued at less than \$20 per person. Receipt of gratuities and gifts by surveyors creates an appearance of impropriety and should be formally addressed by the bureau.

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### Report Organization

This report is organized into four chapters. Chapter II provides background information about the Quality Assurance Division and the Certification Bureau. Chapter III presents information about bureau survey activities. Chapter IV presents information about the survey process and recommendations for improving the survey process.

# **Chapter II – Nursing Home Regulatory Activities**

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## **Introduction**

Montana state law delegates responsibility for licensing and regulating health care facilities, including nursing homes, to the Department of Public Health and Human Services. The department assigned health care facility regulatory activities to the Quality Assurance Division. Within the division, the Licensure Bureau is responsible for enforcement of state licensing and regulatory activities related to health care facilities. The Certification Bureau within the division is responsible for enforcement of Medicare and Medicaid program certification requirements for health care facilities, including nursing homes. This chapter provides an overview of Certification Bureau survey and enforcement activities for nursing home compliance with these programs requirements.

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## **DPHHS Regulates Different Types of Health Care Facilities**

Health care facilities refer to a wide array of entities that provide health care and services. Montana statute describes 17 different types of health care facilities that must be licensed to operate in the state. Examples of health care facilities that must be licensed include:

- ▶ Nursing homes
- ▶ Adult day care and foster care centers
- ▶ Mental health facilities
- ▶ Personal care homes
- ▶ Retirement homes

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## **What is a Nursing Home?**

As of June 30, 2002, 102 nursing home facilities were licensed to operate in Montana. Nursing homes provide care and services to persons unable to care for themselves or to receive necessary care and services from family members or home-based services program. While most nursing home residents are elderly, nursing homes also provide care and services to individuals who suffer from medical conditions such as dementia, Alzheimer's disease, debilitating diseases, or have sustained significant injuries that limit persons' abilities to care for themselves. Additionally, nursing homes can be transitional care facilities for persons recuperating from surgeries, illness, or injuries.



## Chapter II – Nursing Home Regulatory Activities

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The availability of independent and assisted living facilities and home-based services has also changed the focus of care and services provided by nursing homes. These alternative facilities and services provide the elderly, disabled, or infirm greater opportunities to remain independent. Consequently, nursing home residents tend to require higher levels of nursing care and other services.

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### Who Operates Nursing Homes?

Different types of organizations and entities operate nursing homes in Montana, ranging from private sector companies to governmental entities. The table below shows the types of organizations operating nursing homes in Montana and the number operated by each type of organization.

**Table 1**  
**Nursing Home Ownership in Montana**

Ownership Type	Number of Facilities
Non-Profit Corporation	41
For Profit Corporation	36
County Government	13
Non-Profit Church Related	5
Government – Hospital District	3
Tribal	2
State Government	2
<b>Total</b>	<b>102</b>

**Source: Quality Assurance Division Records.**

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### Nursing Homes are Subject to State and Federal Regulations

Nursing homes must comply with both state and federal regulations. The following sections describe state and federal regulatory activities.

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### The State Licenses Nursing Homes

All nursing homes must be licensed to operate in Montana. The Licensure Bureau within the Quality Assurance Division is responsible for licensing health care facilities. The Licensure Bureau licenses nursing homes every one to three years. State regulations



## Chapter II – Nursing Home Regulatory Activities

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set minimum standards for the operations of nursing homes, including:

- ▶ Construction standards
- ▶ Facility staffing
- ▶ Patient and resident records
- ▶ Policies and procedures
- ▶ Environmental controls
- ▶ Food service

The Licensure Bureau is responsible for inspecting nursing homes for compliance with state nursing home regulations. The Licensure Bureau may deny, revoke, or suspend health care facility licenses if a facility fails to comply with state regulations. This performance audit did not examine state licensing activities related to nursing homes.

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### **The State Enforces Medicare and Medicaid Regulations**

Most Montana nursing homes receive payments from the Medicare or Medicaid programs. Medicare pays the cost of caring for elderly and certain disabled persons, and provides benefits for up to 100 days of nursing home care. Medicaid pays the cost of caring for certain individuals and families with low incomes and resources. To participate and receive payments from these federal programs, nursing homes must meet federal program standards. The Certification Bureau examines nursing home compliance with life safety requirements and 15 general areas of care and services provided, such as:

- ▶ Nursing care
- ▶ Dietary menus and food preparation
- ▶ Rehabilitative services
- ▶ Social activities and services
- ▶ Resident rights

This performance audit focused on state enforcement of Medicare/Medicaid regulations.

## Chapter II – Nursing Home Regulatory Activities

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### **The Federal Government Sets Standards for Participation in Medicare and Medicaid**

At the federal level, the Centers for Medicare and Medicaid Services (CMS) establish regulations for nursing homes. This agency has developed a set of regulations governing health, safety, and sanitation issues for nursing homes. It also has developed a corresponding set of survey guidelines used to inspect nursing homes nationwide. The department contracts with CMS to conduct nursing home surveys in accordance with the federal standards and regulations.

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### **Federal Regulations Require Nursing Homes Be Surveyed At Least Once Every Fifteen Months**

The department's contract with CMS and federal regulations requires the bureau survey each nursing home at least once every fifteen months. The following table describes the types and required frequency of surveys the bureau conducts.

**Table 2**  
**Types of Nursing Home Surveys**

Type	Description
Survey	Inspection required by federal law to be conducted on average every twelve months, but no less than every fifteen months per home.
Revisit	Revisits, or follow-up surveys, are conducted to determine whether deficiencies found in a survey have been corrected. Revisits must be conducted within 90 days of the date a facility was to have implemented a plan of correction for previous deficiencies.
Complaint Investigation	Survey conducted when the bureau receives complaints regarding a facility.

**Source: Centers for Medicare and Medicaid Services.**

## Chapter II – Nursing Home Regulatory Activities

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Table 3 presents information on bureau health survey activities.

<b>Table 3</b>			
<b><u>Numbers of Surveys Conducted</u></b>			
<b><u>Fiscal Year 2000 to 2002</u></b>			
	<b>Federal FY 2000</b>	<b>Federal FY 2001</b>	<b>Federal FY 2002</b>
Surveys	91	97	82
Survey Revisits	95	97	76
Complaint Investigations*	61	64	68
Totals	247	258	226
*Some complaint investigations may be conducted in conjunction with surveys or survey revisits.			
<b>Source: Compiled by Legislative Audit Division from Certification Bureau Records.</b>			

The Certification Bureau is also responsible for investigating allegations of abuse or neglect that occur at nursing homes. The bureau reported receiving 613 reports of abuse or neglect during federal fiscal year 2001. Of these reports, 409 were resident-to-resident incidents, and 204 were staff-related incidents.

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### **Bureau Funding and FTE Levels**

The bureau operates from a central location in Helena; six of thirty authorized FTE are assigned to a satellite office in Billings. The bureau is funded primarily from federal funds. Table 4 provides information on the bureau's FTE, expenditures, and funding sources.

## Chapter II – Nursing Home Regulatory Activities

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**Table 4**  
**Certification Bureau FTE and Expenditures**  
**Fiscal Years 2000 through 2002**

<u>Category</u>	<u>FY 2000</u>	<u>FY 2001</u>	<u>FY 2002</u>
Authorized FTE	34	34	30
Personal Services	\$1,319,603	\$1,197,119	\$1,060,028
Operating Expenses	\$ 360,719	\$ 419,777	\$ 417,465
Equipment	\$ 0	\$ 0	\$ 12,834
Total	\$1,680,322	\$1,616,896	\$1,490,327
General Fund	\$ 155,555	\$ 145,626	\$ 123,410
Federal Fund	\$1,524,767	\$1,471,270	\$1,366,917
Total	\$1,680,322	\$1,616,896	\$1,490,327

**Source:** Compiled by Legislative Audit Division from Quality Assurance Division records.

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### The Survey Process

The bureau must conduct both health and life safety surveys of nursing homes participating in the Medicare/Medicaid programs. Bureau surveys consist of several steps from planning the survey to facility appeals of survey findings. Health and life safety surveys use essentially the same process. The following sections describe the survey process.

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### Scheduling Surveys

A bureau survey supervisor is responsible for scheduling surveys. This person reviews bureau documentation to determine when a facility needs to have a certification survey conducted. The scheduler also considers factors such as previous survey results and staffing needs when determining which surveyors will be assigned to a survey team. Typically, two to four surveyors are assigned to a team, but as few as one person or more than four persons may be assigned to a team depending on the size of a nursing home or the anticipated complexity of the survey. Each survey team is assigned a “team leader,” who is responsible for preliminary planning and assuring survey tasks are completed.

## Chapter II – Nursing Home Regulatory Activities

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Life safety surveys are usually conducted during the same week or within several weeks of, but rarely before, a health survey. One life safety surveyor typically conducts life safety surveys.

### **Scheduling is Coordinated with Other Programs**

Scheduling activities include coordinating survey activities with:

- ▶ The Licensure Bureau, which conducts licensing activities and investigations for compliance with state laws and regulations.
- ▶ The Audit and Compliance Bureau, which identifies and investigates issues related to improper or inappropriate Medicare/Medicaid payments to providers.
- ▶ The state long-term care ombudsman within the Senior and Long-Term Care Division within the Department of Public Health and Human Services. The ombudsman's office helps residents understand and exercise their rights, and responds to complaints about care and services to the elderly, including complaints from nursing home residents or their families.

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### **Survey Planning**

The team leader reviews previous survey and complaint documentation to identify potential areas of concern. The team leader also obtains information about potential nursing home resident risks, such as a high incidence of depression, falls, or specific medical conditions, to identify specific areas that may need increased survey emphasis. For example, a facility with high incidences of behavior problems may indicate a need to examine this area in more detail. Having a high number of incidents or residents with special care or service needs does not necessarily indicate a facility is having difficulties in an area. For example, residents with dementia or Alzheimer's disease are more likely to have more behavioral problems. Conversely, a facility with few dementia residents may experience fewer behavior problems.

The team also selects a sample of residents for review. The number of residents selected is based on the number of residents in a facility. Residents are selected for review according to their needs and medical condition and potential risk or care factors identified for the facility. For example, if preliminary work indicates a facility has a high percentage of residents with care or service needs in particular

## **Chapter II – Nursing Home Regulatory Activities**

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areas, the team will identify those residents who have all or most of those care or service needs. This process allows the surveyors to focus on areas that pose the greatest risk to residents.

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### **Health Survey Activities**

Surveyors typically spend approximately four days at a nursing home examining fifteen general areas related to care and services. Nursing home activities reviewed range from quality of care and quality of life to resident rights and facility administration. Types of activities conducted by surveyors during health surveys include:

- ▶ Observing care provided to residents by nursing home staff.
- ▶ Observing and examining residents.
- ▶ Reviewing resident files and records.
- ▶ Reviewing nursing home policies and procedures.
- ▶ Inspecting the condition of the nursing home, including the kitchen.
- ▶ Interviewing residents and residents' family members about nursing home practices and activities.
- ▶ Interviewing nursing home staff about facility practices, policies, and procedures.

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### **Life Safety Survey Activities**

Life safety surveyors typically spend approximately one day at a nursing home examining life safety factors, and include activities such as:

- ▶ Observations and inspections of building structure.
- ▶ Reviewing nursing home safety and fire prevention policies and procedures.
- ▶ Conducting a fire drill and observing nursing home staff during the drill.
- ▶ Verifying facility fire and safety equipment has been inspected.

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### **Surveyor Meetings with Nursing Home Personnel**

During a survey, surveyors typically meet with nursing home personnel several times to keep them informed of potential



## Chapter II – Nursing Home Regulatory Activities

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deficiencies identified during the survey or other concerns. Before surveyors leave a nursing home they conduct an exit conference with nursing home management to inform them of the general nature of deficiencies identified during the survey.

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### **Deficiencies are Rated According to Federal Standards**

After completing on-site survey work, surveyors determine which specific deficiencies will be cited and classify deficiencies according to standards set by the Centers for Medicare and Medicaid Services (CMS). Deficiencies are classified into one of twelve categories (A-L), depending on the scope and severity of the deficiency. Scope refers to the number of residents potentially or actually affected, and severity refers to the harm or risk of harm posed to residents. The following matrix describes the different classifications.



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**Table 5**  
**Scope and Severity of Nursing Home Deficiencies**

Severity Levels	Scope		
	Isolated	Pattern	Widespread
Immediate Jeopardy: Residents are at immediate risk for severe injury or death.	J	K	L
The deficiency results in a negative outcome that has compromised the resident's ability to maintain and/or reach his/her highest practicable physical, mental and psychosocial well-being.	G	H	I
The deficiency results in no more than minimal physical, mental and/or psychosocial discomfort to the resident(s) and/or has the potential to compromise the resident's ability to maintain and/or reach his/her highest practicable physical, mental and/or psychosocial well-being.	D	E	F
The deficiency has potential for causing no more than a minor negative impact on the resident(s).	A	B	C

Note: Shaded boxes indicate substandard quality of care

Source: CMS State Operations Manual for Surveys.

An example of substandard care would be a deficiency classified as an “F” or higher in which one or more residents were identified to have pressure sores (bed sores) that could have been prevented with appropriate care, such as regular repositioning and pressure relieving devices.

### **Bureau Notifies Nursing Home of Identified Deficiencies**

After the survey team leaves the facility, the bureau has ten working days to provide the nursing home with a report describing survey findings and outcomes. Information in the report includes:

- ▶ The deficiencies identified.

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- ▶ The scope and severity of the deficiencies.
- ▶ Examples identified to support cited deficiencies and their scope and severity classification.

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### Nursing Homes Must Submit a Plan of Correction

After receiving the survey report, nursing homes must submit a Plan of Correction to the bureau within ten calendar days. The plan of correction must:

- ▶ Address how the nursing home will correct the problem for those residents found to have been affected by the deficient practice.
- ▶ Address how the nursing home will identify other residents that have the potential to be affected by the deficient practice.
- ▶ State what preventative measures the nursing home will implement so the problem does not recur.
- ▶ State how the facility plans to monitor performance to assure corrective actions are sustained.
- ▶ Indicate when the corrective action will be completed. The date of implementation must be within 60 days of when the nursing home received the copy of the report.

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### Survey Reports are Public Documents

Survey reports are public documents and nursing homes must post the report in a conspicuous location in the facility. Survey reports for any facility are available from the Certification Bureau. Report information is also available from the Centers for Medicare and Medicaid Services website.

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### Nursing Homes May Appeal Cited Deficiencies

Nursing homes may appeal deficiencies they believe are in error. The appeal process is outlined in federal regulation. The initial step in the process is called an Informal Dispute Resolution (IDR). The IDR is a process involving nursing home and bureau personnel. The nursing home must submit a written request for an IDR within ten days of receiving a copy of the report, which is the same time frame for submitting a plan of correction. The IDR request must include the specific deficiencies the nursing home wants to appeal, and the reason for the appeal. The nursing home must also request the type of IDR preferred, which may be:

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- ▶ A review of documentation provided by the nursing home and related survey documentation. Bureau policy requires documentation reviews be completed within seven calendar days of the request.
- ▶ An IDR by telephone or face-to-face. The nursing home is still required to provide copies of supporting documentation for either of these types of reviews, and bureau policy states the reviews must be conducted within ten working days of the request.

Nursing homes may use the IDR process only to contest factual elements of a survey report. Nursing homes may not use the IDR process to delay imposition of remedies or sanctions. Nursing homes may not use the IDR process to challenge the scope and severity of a deficiency, although the scope and severity may be changed as a result of information provided by the nursing home. Additionally, nursing homes may not use the IDR process to contest remedies imposed by the bureau or its survey activities or procedures.

Table 6 describes the number of IDRs conducted by the bureau between 1999 and 2002.

<b>Table 6</b>	
<b><u>IDRs Conducted by Bureau between 1999 and 2002</u></b>	
<b>Calendar Year</b>	<b>Number of IDRs</b>
1999	7
2000	33
2001	34
January 1, 2002 through July 2, 2002	16

**Source: Compiled by the Legislative Audit Division from Certification Bureau Records.**

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### The Informal Dispute Resolution Review

An IDR is typically conducted at the bureau's central office in Helena by the bureau chief. Other persons attending an IDR may include:

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- ▶ The nursing home administrator.
- ▶ Other nursing home personnel.
- ▶ A survey supervisor who typically is not involved in on-site surveys.
- ▶ Members of the survey team as available.

After bureau personnel and nursing home personnel have met, bureau personnel meet to discuss the issues and evidence presented during the IDR to determine whether cited deficiencies should be deleted, reduced in scope or severity, or otherwise modified.

Federal regulations limit nursing homes to one opportunity to dispute cited deficiencies using the IDR process. If a remedy or sanction is imposed, a nursing home may request an administrative hearing through CMS, which is conducted before an administrative law judge. Only one nursing home in Montana has contested cited deficiencies through this process. A nursing home may also appeal bureau decisions through civil litigation, but no facilities have used this option.

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### **Failure to Comply with Regulations Can Result in Remedies Being Imposed**

The state and CMS may impose “remedies,” or sanctions, on nursing homes that fail to comply with federal regulations. Remedies, or sanctions, are typically imposed when there is immediate jeopardy or harm to residents or a nursing home fails to implement an approved plan of correction. The nature of remedies that may be imposed depends upon the scope and severity of the deficiency cited.

Examples of remedies that may be imposed are:

- ▶ A directed plan of correction. The bureau determines the corrective action plan for the nursing home.
- ▶ Denial of Medicare/Medicaid payments.
- ▶ Directed in-service training.
- ▶ Civil monetary penalties.

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- ▶ Loss of ability to conduct nurse aide training programs.
- ▶ Closing of a nursing home or transfer of residents to another nursing home or both.

The Certification Bureau can impose a directed plan of correction or deny Medicare/Medicaid payments. Other remedies must be imposed by CMS upon a recommendation from the bureau.

# Chapter III – The Certification Bureau’s Mission and Objectives

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## Introduction

One objective of this audit was to examine the role of the Certification Bureau (bureau) and present information about bureau services. This chapter presents information, findings, and conclusions based on our audit work.

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## Nursing Home Care is an Essential Service

Nursing home care is a critical service to Montana citizens, providing necessary nursing and skilled nursing care to those unable to care for themselves or receive necessary care and services from other resources. As of October 2002, there were 102 nursing homes in the state providing care and services to more than 7,500 individuals.

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## Certification Bureau Provides Critical Oversight of the Nursing Home Industry

A primary goal of the bureau is to “Protect the safety of our elderly and vulnerable program recipients from dangerous and abusive care practices.” To accomplish this goal, the bureau surveys, or inspects nursing homes on a regular basis to verify compliance with federal regulations governing the operation of nursing homes participating in the Medicare and Medicaid programs.

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## The Bureau Evaluates a Variety of Care and Services Provided by Nursing Homes

Federal regulations describe approximately 190 types of nursing home care and services in fifteen general areas that survey activities either may or are required to examine. Types of care and services surveyors examine include:

- ▶ Medications. Surveyors review medical records and observe nursing home personnel to ensure medications are appropriately distributed to residents and to verify nursing homes are not administering unnecessary drugs.
- ▶ Quality of Care. Surveyors verify medical care is provided in accordance with accepted standards of practice, and is provided to help assure residents reasonably maintain acceptable levels of functioning.



## **Chapter III – The Certification Bureau’s Mission and Objectives**

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- ▶ **Assessments and Care Plans.** Surveyors examine whether nursing homes conduct required assessments of resident abilities and regularly assess residents and verify resident needs are properly addressed in care plans.
- ▶ **Quality of Life.** Surveyors verify residents have reasonable opportunities to socially interact with other residents, participate in appropriate activities, and have a safe, clean, and homelike environment.
- ▶ **Nutrition.** Surveyors verify nursing homes provide acceptable and nutritious meals and snacks to assure proper nutrition. Additionally, surveyors examine whether nursing homes provide appropriate assistance to residents with limited abilities to feed themselves.

Audit work included reviewing the three most recent surveys for each nursing home from a statistical sample of 24 of 103 nursing homes to identify the survey outcomes. During these surveys, the bureau cited the selected nursing homes for 297 deficiencies, including 37 deficiencies in which the bureau determined one or more residents had been harmed by nursing home practices. The majority of the other deficiencies cited nursing homes practices in which surveyors had identified one or more instances in which there was potential for more than minimal harm to one or more residents. Bureau documentation also indicated seven nursing homes had one deficiency-free survey and one facility had two deficiency-free surveys during the three most recent surveys.

Some of the more serious deficiencies commonly cited by bureau surveyors include:

- ▶ **Failure to care for or prevent pressure sores.** Pressure sores, or bedsores, occur when a person, particularly anyone confined to a bed or a wheelchair, sits or lies in the same position for a very long time. These sores can become serious or even life threatening if left untreated or become infected.
- ▶ **Failure to maintain adequate nutrition status.** Nutritional status commonly refers to maintaining a healthy body weight or health conditions.



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- ▶ Failure to provide proper care and services. Commonly, proper care and services refer to assuring residents receive necessary assistance with daily grooming, cleanliness, or services designed to prevent unnecessary decline in a resident’s abilities.
- ▶ Use of unnecessary drugs. Use of unnecessary drugs generally refers to excessive dosages, excessive duration of administration, and inadequate indications for its use.
- ▶ Unnecessary use of physical or chemical restraints. Restraints are typically referred to as devices or medications used for purposes of convenience and not to treat a medical condition. For example, some care providers have used medications primarily to sedate residents for behavior management rather than for a demonstrated medical need.

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### Regular Monitoring is Critical

Survey revisits and continued monitoring are critical to the welfare of nursing home residents. Although facilities are required to submit and implement a plan of correction for cited deficiencies, audit work identified instances of deficiencies being re-cited in subsequent surveys. For example, in the sample of 24 nursing homes, 16 nursing homes had deficiencies cited two or more times in the three most recent surveys. Additionally, regular surveys are essential since nursing homes may have a deficiency-free survey with subsequent surveys identifying multiple deficiencies.

<b>Conclusion:</b> Bureau survey activities are a critical oversight function for residents of Montana nursing homes.
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### Bureau Survey Activities Do Not Duplicate Licensing Activities

As mentioned in the previous chapter, nursing homes must be licensed by the state and operate in compliance with state nursing home regulations, as well as federal Medicare/Medicaid regulations, to be eligible for reimbursements from those programs. We reviewed whether Licensure Bureau activities duplicate Certification Bureau nursing home survey activities.

State and federal regulations typically set the same or similar requirements for the operation of nursing homes. Additionally, most nursing home beds in Montana are certified eligible for Medicare/Medicaid. Because of the similarity in Medicare/Medicaid and state regulations, the Licensure Bureau relies on Certification

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Bureau survey work and reports to determine whether nursing homes comply with state regulations. We did not examine Licensure Bureau inspection activities related to state nursing home regulations.

**Conclusion:** The Certification Bureau does not duplicate inspection activities conducted by the Licensure Bureau.

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### Qualifications of Bureau Surveyors

We reviewed the qualifications of bureau surveyors. Federal regulations require surveyors have experience working in one of several professional fields ranging from nursing to rehabilitation therapies to social work.

All bureau surveyors have previous experience working in medical facilities or nursing homes. Many surveyors have at least three or more years working in nursing homes. Professional backgrounds include experience in geriatric nursing, directors of nursing, dietetics, mental health, and social work.

Federal regulations also require surveyors pass the Surveyor Minimum Qualifications Test (SMQT) before being allowed to survey independently. All bureau surveyors, except for several surveyors-in-training, had successfully completed this training.

**Conclusion:**

- ▶ Bureau survey personnel meet federal qualification requirements.
- ▶ Surveyors have previous experiences working in medical facilities, nursing home, or in related fields.

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### The Bureau Also Conducts Life Safety Surveys

One objective of the audit was to determine whether life safety surveys conducted by the bureau duplicate fire inspections conducted by the State Fire Marshal or local fire departments.

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Nursing homes are regularly inspected by state and local fire service agencies for compliance with the Uniform Fire Code, the fire code adopted by administrative rule and enforced in Montana. Bureau life safety surveys, which are coordinated with health surveys, also examine fire and safety issues. However, CMS has adopted a different code called the Life Safety Code (LSC). CMS only accepts fire and life safety inspections conducted in accordance with the LSC.

While there are similarities between fire inspections and the bureau’s life safety surveys, the scope of the respective inspections are different. Fire inspections tend to focus on basic fire prevention and protection strategies, such as assuring the fire department will have ready access to the building, there are evacuation strategies for residents, and familiarizing firefighters with the facility design and structure.

Life safety surveys are a more in-depth inspection, or survey, of nursing home fire and safety issues. Bureau surveys include:

- ▶ Reviewing building structure to assure building structure meets LSC standards and there are no gaps in smoke and fire barriers.
- ▶ Inspecting and verifying mechanical safety devices work properly.
- ▶ Conducting a fire drill and observing nursing home staff to assure compliance with facility policies and safety standards.
- ▶ Inspecting and verifying other equipment or electrical devices meet nursing home standards and are properly installed.

### **Conclusion:**

- ▶ The Certification Bureau’s Life Safety Code surveys are essential activities since federal regulations do not accept fire code inspections based on the Uniform Fire Code.
- ▶ Life Safety Code surveys are typically a more extensive inspection of nursing homes life safety conditions than fire department surveys, providing increased assurance nursing home residents live in safe environments.



# Chapter IV – Audit Findings and Recommendations

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## Introduction

This chapter presents findings and recommendations for improving Certification Bureau (bureau) operations and increasing bureau efficiency and effectiveness, related to:

- ▶ Timing and the increasing predictability of surveys.
- ▶ Improving recruitment and retention of surveyors.
- ▶ Increasing operational efficiencies to help meet goals and objectives with available resources.
- ▶ Ensuring cited deficiencies are supported and based on defined criteria.
- ▶ Improving consistency of cited deficiencies.
- ▶ Efficiency and effectiveness of bureau activities.
- ▶ Ensuring cited deficiencies are based on regulation or law.
- ▶ Improving communication and coordination with the regulated community.

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## Bureau Vacancies have Affected Survey Activities

Staff vacancy rates of almost 30 percent have impacted the bureau's ability to comply with federal Medicare and Medicaid program requirements and reduced the effectiveness of bureau operations. Consequently, surveys are being delayed and are becoming increasingly predictable.

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## Timing of Surveys are Falling Behind Minimum Federal Requirements

Federal Medicare and Medicaid program regulations require that regular certification surveys for nursing homes be completed no later than 15 months after the previous survey, and the length of time between all surveys average no more than 12 months. A 2001 performance evaluation of bureau activities by the Centers for Medicare and Medicaid Services (CMS), the federal oversight agency for the Medicaid and Medicare programs, indicated the bureau had complied with program timeliness requirements. However, analysis using current data indicates bureau surveys are beginning to exceed federal timeliness requirements.

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We selected a random statistical sample of 24 of 103 nursing homes. The average length of time between the most recent surveys conducted between February 2001 and May 2002 and the previous survey was 13.5 months. Additionally, some survey revisits were not conducted within 90 days of a survey as required by federal regulations, and some were delayed more than 30 days.

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### **Increased Predictability of Surveys**

Federal regulations prohibit announcing surveys and set broad time-frame requirements to ensure surveys are as unpredictable as possible. While audit work did not indicate instances of survey dates being announced to facilities, surveys become increasingly predictable as they approach the 15-month time limit. The bureau conducts more than 50 percent of its surveys more than 13 months after the previous survey, and 25 percent of the surveys were conducted during the 15th month. The division conducted only 4 surveys less than 12 months after the previous survey, of which 1 survey was at a special focus facility being inspected every 6 months. Several nursing home administrators also stated they expected surveyors, and had either prepared information for a survey team or adjusted their schedules, because their facility was approaching or past the 15-month deadline for a recertification survey.

While staff vacancies have contributed to the problem, the bureau can modify recruitment and retention strategies to help reduce the number of vacant surveyor positions.

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### **The Bureau Can Improve Recruitment and Retention Strategies**

Agency documentation and interviews with bureau management indicated the bureau has had difficulty recruiting and retaining registered nurses as surveyors. As previously mentioned, the bureau has had a vacancy rate of almost 30 percent, and almost one-half of bureau surveyors have less than one year of survey experience with the bureau.

According to division management, surveyor wages have not been attractive for recruiting registered nurses. Additionally, a nationwide shortage of registered nurses has made it more difficult for the



## Chapter IV – Audit Findings and Recommendations

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bureau to recruit surveyors. While these factors do affect recruitment and retention, the bureau can modify practices to expand the pool of applicants from which it recruits and improve retention of surveyors.

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### **The Bureau Can Modify Recruiting Strategies**

The bureau primarily recruits for and hires registered nurses. According to management, registered nurses are generally the most qualified because of their education, medical training, and experience. However, federal guidelines encourage survey agencies to recruit individuals from other professions providing services to nursing home residents because regulations include a strong emphasis on providing rehabilitative and psycho-social care and services. Examples of other professions qualified to conduct surveys include various rehabilitative and therapeutic professionals, dietitians, social workers, licensed practical nurses, and sanitarians.

### **Bureau Practices Restrict the Pool of Potential Applicants**

Registered nurses are critical to the survey process. However, restricting recruitment to registered nurses also limits the pool of potential qualified applicants to a profession with high demand and limited available persons. By expanding the recruitment and selection process to include other qualified professionals the bureau may increase the number of qualified applicants for survey positions.

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### **The Bureau Can Implement Employment Incentives**

Financial remuneration affects employee recruitment and retention, and division management stated surveyor wages have adversely affected recruitment and retention. Additionally, management said some surveyors leave the bureau to obtain management or administrative positions paying higher wages. The bureau recently obtained a change in classification systems for surveyors, resulting in approximately a 15 percent wage increase to help address this concern. However, surveyor wages prior to the bureau's reclassification were approximately equal to the prevailing wage for registered nurses in the state, and above the prevailing wage in some areas. State government employment also offers competitive benefits such as retirement plans, health care benefits, and paid vacation leave.



## Chapter IV – Audit Findings and Recommendations

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Other workplace and environmental factors also affect employee satisfaction. A common strategy for improving recruitment and retention is implementing non-monetary incentives, such as:

- ▶ Opportunities to develop skills
- ▶ Opportunities for promotion
- ▶ Allocating special assignments
- ▶ Granting additional responsibilities
- ▶ Improving working environment

One option for improving the working environment is implementing teleworking as an option for surveyors.

### **Teleworking Can Improve Recruitment and Retention**

Teleworking is defined as a flexible work arrangement where selected employees work one or more days a week from their home or a site near their home instead of traveling to an office location. While the bureau requires surveyors to work out of an assigned office, either in Helena or Billings, approximately one-half of their work time is outside the office in health care facilities. Other surveyor duties, such as preparing for surveys, reviewing survey documentation, and writing reports do not typically require surveyors to work in a fixed location or central office. According to a Montana Department of Administration guide, teleworking is appropriate for positions such as surveyors, and can improve employee morale and job satisfaction by:

- ▶ Increasing work flexibility. While teleworking requires management to define expected work products, teleworking gives employees greater flexibility to complete their responsibilities at times most convenient for them.
- ▶ Reducing employee-commuting costs.
- ▶ Reducing employee travel time. While teleworking will not reduce the need to travel, surveyors working in their region or area may spend fewer hours traveling.

Additionally, potential benefits to the bureau include:

## Chapter IV – Audit Findings and Recommendations

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- ▶ Reduced costs for office space. The bureau could eliminate the satellite office in Billings, and reduce the amount of office space needed in Helena. While cost savings would be offset by some initial equipment purchases and monthly Internet access and telephone costs, the bureau could realize significant reductions in fixed office costs.
- ▶ Increased access to new labor markets and an increased pool of qualified applicants. Montana is a rural state, and qualified individuals may be reluctant to disrupt family and community ties to accept positions located in Helena or Billings.
- ▶ Increase the bureau's flexibility to conduct survey and enforcement activities, and potentially reduce some travel-related costs.
- ▶ Make other options more viable. Teleworking could increase opportunities for job-sharing or use of part-time employees. Potentially, the bureau could employ individuals who have successfully completed surveyor training as short-term or part-time surveyors located in different areas of the state. This would increase the bureau's ability to respond to survey and complaint investigation activities on an as-needed basis, which may further reduce some bureau costs.

Teleworking may still require surveyors to work in an office periodically for training and completing some administrative tasks. Teleworking would also require the bureau to modify supervision strategies to increase the level of field supervision. However, the options available through teleworking could improve the bureau's ability to recruit qualified and experienced personnel. Ultimately, improved employee morale and job satisfaction offers additional benefits to any agency by improving employee longevity and experience, increasing employee productivity, and reducing costs associated with recruiting and training new employees.

## Chapter IV – Audit Findings and Recommendations

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### **Recommendation #1**

**We recommend the Certification Bureau:**

- A. Expand recruitment of surveyors to other appropriate professionals.**
- B. Identify and implement alternative incentives for recruiting and retaining qualified staff.**

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### **Improving Management Information Can Increase Operational Efficiencies**

The bureau can increase operational efficiencies to help meet its objectives with available limited resources. One area for improvement is development of a more efficient and effective management information system. Currently, the bureau relies on a manual paper system and tracks and schedules various bureau activities separately. The system cannot alert the scheduling person when nursing homes need a survey. Furthermore, the system has no means for helping the scheduling person coordinate revisits or complaint investigations with scheduled surveys in the same geographical area.

### **The Bureau Can Reduce Travel Expenses**

Implementing an automated management information system could also minimize the amount of time surveyors spend traveling to nursing homes. Of 59 health surveys conducted between October 2001 and June 2002, in 20 instances the division scheduled one or more health surveyors from one office to conduct surveys at nursing homes that were closer to another office. For example, in some instances surveyors from Helena were sent to Billings or eastern Montana to conduct surveys, or surveyors from the Billings satellite office were sent to nursing homes in western Montana. Consequently, surveyors spent 239 hours traveling which might otherwise have been used for direct survey and investigative activities. Additional costs for wages of staff in travel status exceeded \$4,800. Costs not included in this analysis are per diem and lodging costs, potential overtime for surveyors, and adverse impact on employee morale and job satisfaction. Audit work identified similar examples for life safety code surveyors.

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In some instances, additional travel times may be necessary to ensure independence during surveys, although this did not impact scheduling in the cases reviewed. Additionally, the bureau may want to facilitate communication and coordination among surveyors at the two offices. Implementing an automated system to help coordinate scheduling will reduce the time surveyors spend in a travel status, thereby increasing time available for direct survey activities.

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### **The State Has Technology to Improve Efficiency of Bureau Survey Activities**

The bureau could use existing technology available to state agencies to improve management information and scheduling. Databases can be used to automate tracking of survey activities. Additionally, geographic information system (GIS) software could improve coordination of scheduling various tasks and activities. A reported benefit from using a GIS database is the ability to increase the effectiveness and efficiency of agency operations. This technology, which incorporates database information with graphical representations, makes it easier to use data for routine decision-making and coordinate multiple activities, such as scheduling surveys and survey revisits. Improved information management promotes efficiency and effectiveness, which can help an agency achieve its goals and objectives with fewer resources.

#### **Recommendation #2**

**We recommend the Certification Bureau develop and implement a management information system that:**

- A. Increases the bureau's ability to track and monitor the timing of surveys.**
- B. Increases the bureau's ability to schedule and assign staff to maximize resources available for direct survey activities.**

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### **The Bureau Can Improve Quality Controls**

Bureau vacancies and difficulties retaining experienced surveyors have also affected the bureau's quality control efforts. The following sections present information on weaknesses in and recommendations for improving the survey process.

## Chapter IV – Audit Findings and Recommendations

### Some Deficiencies are not Appropriately Cited

Audit work indicated nursing homes request an IDR for approximately 26 percent of all health deficiencies cited, and the majority of IDRs resulted in a positive outcome for nursing homes. To examine this more closely, we selected a random sample of 24 of 93 health surveys conducted between 1999 and 2002 for which nursing homes requested an IDR for one or more cited deficiencies. Surveyors cited 193 deficiencies and nursing homes requested an IDR review of 55 cited deficiencies. Approximately 85 percent of the deficiencies are subsequently modified, indicating most nursing homes only contest those deficiencies they believe will be successfully overturned or modified. Table 7 describes the outcomes of IDR reviews.

**Table 7**  
**Informal Dispute Resolution Outcomes**

IDR Outcome	Number	Percentage
Deficiencies Deleted	22	40%
Reduced Severity or Scope	8	14%
Wording Change	17	31%
No Change	8	15%
Totals	55	100%

**Source:** Compiled by the Legislative Audit Division from Certification Bureau records.

Further examination of IDR reviews conducted by the bureau indicated:

- ▶ Improper and inconsistent severity determinations. In some instances, the bureau determined after the IDR that there was no actual or potential harm, or the level of harm was less than cited.
- ▶ Improper and inconsistent scope determinations. Surveyors have different criteria for determining the scope of a deficiency. For example, one surveyor may classify a deficiency with two examples of a deficiency as “isolated occurrences,” while another surveyor may cite two examples as a “pattern of occurrences.”
- ▶ Improper use of criteria. Surveyors may cite deficiencies based on criteria that federal guidelines exclude, or which exceed the



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scope of a regulation. Bureau documentation also indicated deficiencies cited in previous reports are sometimes considered when determining scope and severity, although federal regulations state scope and severity determinations must be based only on examples from the current survey.

- ▶ Improper citation of regulations. Survey reports cited deficiencies to the wrong regulation.
- ▶ Survey reports contained factual errors.

A 2001 performance evaluation by the Centers for Medicare and Medicaid Services of bureau deficiency citations also identified similar weaknesses. Additionally, nursing home personnel and administrators expressed similar concerns with deficiency citations.

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### **Federal Regulations Require Consistency for Survey Activities**

Federal regulations require and expect consistency in the survey process. Regulations also require survey agencies develop and implement processes to promote and ensure consistency of survey results.

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### **Inconsistencies and Improperly Cited Deficiencies Increase Bureau and Nursing Home Industry Costs**

Inconsistencies and improperly cited deficiencies increase costs to the bureau. Although the bureau has not regularly tracked all staff time spent on IDRs, this process requires additional resources to prepare for, conduct, and modify survey reports. For example, ten randomly selected IDR files documented bureau personnel spent at least 60 hours on the sampled IDRs. Additionally, the frequency with which deficiencies are overturned or modified may encourage more facilities to request an IDR of survey findings, further increasing bureau costs.

Nursing homes incur similar costs for requesting an IDR, and may incur some additional costs for traveling to Helena for an IDR. Additionally, since nursing homes must submit a Plan of Correction at the same time they request an IDR, they may incur additional personnel and capital costs for developing and implementing corrective actions for deficiencies that are subsequently deleted.



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### Several Factors Affect Reasons Deficiencies are Changed During an IDR

Several common reasons the bureau changes cited deficiencies, include:

- ▶ Facilities may be unable to provide appropriate documentation demonstrating compliance before the final report is completed. In some instances, facilities provided additional documentation accompanying their IDR request, which the bureau subsequently used to modify a report without need for a more formal review. The bureau has limited ability to address this concern, except to continue working with facility management.
- ▶ Surveyors may not obtain necessary information to properly determine whether a deficiency exists. In some instances, surveyors may not ask appropriate nursing home personnel for clarification of potential deficiencies or may not consider other evidence that would indicate compliance with regulations.
- ▶ Inexperience and lack of training adversely affects surveyors' abilities to appropriately cite deficiencies.

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### Three Primary Factors Affect Bureau Quality Assurance

Three underlying factors identified during the audit affect the quality of bureau survey activities: the division's quality control system, training, and supervision of surveyors. The following sections address these areas in more detail.

### The Bureau Can Improve Quality Control Measures

The bureau's quality control system has weaknesses that limit its effectiveness to ensure the survey process meets division and federal standards for conducting surveys, citing deficiencies, and promoting consistency of the survey process.

CMS, the federal oversight agency, conducts performance evaluations of bureau survey activities. CMS oversight activities include observing survey teams on several surveys, conducting several comparative surveys, and reviewing a sample of other survey documentation. However, CMS activities are primarily "detective" in scope, identifying existing weaknesses, but are not "preventative" controls to ensure individual surveys meet established standards.

The bureau's preventative quality control system primarily relies on survey team members to critically examine deficiencies cited by other surveyors on the team and the bureau chief to review the final

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survey report draft before sending the official report to the facility. According to bureau management, some surveyors, particularly less experienced persons, are less willing to critically examine report sections written by other surveyors. This subsequently limits the level of review before reports receive a final review. The bureau had an employee assigned to reviewing survey reports, which management stated was an effective quality control tool. However, this position has been vacant. Division management also stated they have identified weaknesses in its quality control practices, but did not have the personnel to assign this responsibility.

### **The Bureau Can Improve Surveyor Training**

As noted in the previous chapter, bureau surveyors are qualified and have experience in health care facilities, nursing homes, or both. However, the limited survey experience of bureau surveyors increases the need to focus training efforts on survey activities and decision-making. Bureau management has identified this as an area of concern.

One strategy is to use IDR outcomes to identify weaknesses and strengths and subsequently incorporate them into surveyor training. Surveyors stated the bureau does not regularly inform them of outcomes of IDRs, particularly deficiencies that are subsequently deleted or modified. Additionally, the bureau does not track IDR outcomes to identify why deficiencies are subsequently deleted or changed, or to identify weaknesses in the survey process. Consequently, surveyors cannot learn from previous experiences, and the bureau is limited in its ability to develop training that addresses system weaknesses.

### **Surveyors Work With Limited Supervision**

Surveyors generally work with minimal supervision during the survey process. Of 59 surveys conducted between October 2001 and July 2002, a supervisor did not accompany any teams on a re-certification survey. Observations of surveys also indicated minimal supervision, although surveyors may contact the office for advice or clarification to questions. Additionally, the bureau currently has one supervisor located in the Helena office for eleven surveyors located in Helena and Billings. However, this supervisor is assigned other

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administrative duties with minimal responsibilities for direct supervision of surveyors.

### **Regular and Direct Supervision is Essential to Staff Management**

Examination of care and services provided to nursing home residents is commonly a subjective process, particularly when determining whether potential for harm exists or whether injuries to a resident were the result of poor care services or factors beyond the nursing home's control. For example, good nutrition is essential for maintaining good health and promoting the healing process; however, some residents refuse to eat or take nutritional supplements. Furthermore, almost one-half of the bureau's surveyors have less than a year of survey experience, which increases the need for more direct supervision. Regular supervision is essential for assuring survey activities and decisions are consistent with federal and division standards, as well as for evaluating employee performance and identifying employee professional development and training needs.

### **The Bureau Has Not Recruited for Supervisory Staff**

Two of four supervisor positions have been vacant since November 2001, but the bureau has not advertised the positions either internally or externally. Due to difficulty recruiting surveyors, management was unwilling to promote staff in surveyor positions, concerned the bureau would be unable to recruit staff to fill vacant surveyor positions, further reducing the number of staff available for surveys.

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### **Improving the Bureau's Quality Assurance Program**

Quality controls, training, and staff supervision are all critical elements of an effective quality assurance program. When addressing quality assurance, different elements are inter-related. This section presents options for the bureau to improve quality assurance through improved control systems, training, and supervision.

- ▶ Assign an individual with experience in surveys and nursing home operations as a quality control reviewer.
- ▶ Modify the bureau's Document of Decision Making form. The bureau implemented this form to encourage surveyors to document why a deficiency was cited and how the scope and severity was determined. However, commonly the form only

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provides a brief summary of the deficiency without justifying a surveyor's decision. This form could be modified to require surveyors to provide better descriptions of their reasons for citing a deficiency, with additional emphasis on the criteria the surveyor uses to determine whether a practice is deficient and the negative outcome that did or may occur from a potentially deficient practice. This documentation could also be designed to be a working tool used during surveys to guide staff activities and decisions.

- ▶ Draft preliminary survey reports at facilities to assure all necessary documentation is obtained before leaving a facility.
- ▶ Develop a system for tracking IDR outcomes and incorporate identified problems into surveyor training. Weaknesses identified could be included in both general professional development and individual training activities.
- ▶ Increase the level of direct supervision during surveys. Supervisor positions have been perceived more as administrative-type positions with minimal responsibilities for direct survey activities and minimal travel expectations. However, many staff supervision responsibilities should be performed during or incorporated into direct survey work. Additionally, including supervisors on survey teams increases management awareness of nursing home conditions that affect the validity or credibility of potential deficiencies, increases communications with nursing homes, and keeps management informed about nursing home concerns and activities.
- ▶ Modify the team leader positions to include supervisory responsibilities. Currently, team leaders are responsible for preliminary planning and assuring required survey tasks are completed, but have no supervisory or oversight responsibilities for survey activities and reports. In some instances, the bureau assigned less experienced surveyors as team leaders, including persons who had not completed Surveyor Minimum Qualification Test training (SMQT). The bureau could also use team leader positions as a management tool for training surveyors for higher-level positions.
- ▶ Assign a supervisor to the Billings field office, or have management personnel regularly work in the field office.



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### **A Quality Assurance Program is Essential to Effective Program Management**

An effective quality assurance program is an essential component of effective program management. While a quality assurance program incurs certain costs, the benefits include cost reductions through:

- ▶ Improved consistency in decision-making.
- ▶ Fewer errors that can be costly to the bureau and nursing homes.
- ▶ Increased effectiveness and efficiency of agency operations.

In addition, quality assurance can result in higher customer confidence and satisfaction in the services provided.

#### **Recommendation #3**

**We recommend the Certification Bureau:**

- A. Develop a system of controls to increase the accuracy of survey reports and improve the consistency of scope and severity determinations.**
- B. Incorporate information collected from quality control activities into ongoing staff development and training.**
- C. Re-evaluate resource needs, position descriptions, and supervisory responsibilities, and develop strategies for increasing supervision of survey staff.**

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### **Cited Deficiencies must be Based on Criteria in Statute or Regulations**

One audit objective was to examine whether deficiencies cited by the bureau are based on regulatory criteria. Audit work included examining deficiencies cited in survey reports and other bureau documentation. Two primary areas for examination were bureau reporting requirements for abuse and neglect and enforcement of fire code regulations.

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### **Abuse and Neglect Reports**

Nursing homes are subject to two different sets of standards for reporting allegations of abuse and neglect against the elderly. Federal regulations require nursing homes report to the Certification Bureau allegations of abuse or neglect involving persons employed by or working for the nursing home. Montana law is stricter, and

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nursing homes report all allegations of abuse or neglect regardless of the alleged perpetrator, including abuse or neglect inflicted by another resident. The bureau, under authority of the department, requires nursing homes to report instances of abuse under both state and federal standards.

The nursing home industry questioned whether the Certification Bureau, which is assigned responsibility for enforcing federal regulations, should also be enforcing state abuse and neglect reporting standards. Based on a review of federal and state statutes, the bureau is within its authority to enforce both state and federal abuse and neglect reporting requirements. State law requires allegations of abuse or neglect be reported to the Department of Public Health and Human Services. The department is within its authority to delegate that responsibility to any unit or subunit within the department.

<b>Conclusion:</b>	The Certification Bureau has the authority to require nursing homes to report allegations of abuse and neglect to the bureau whether the alleged incident meets the federal or state definition for abuse or neglect.
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### Some Cited Deficiencies are not Based on Statute or Regulation

We noted instances in which nursing homes were cited for non-compliance based on criteria either not included in or not allowed by federal regulations, such as the temperature of tap water or use of nutritional guidelines. In these instances, we noted the bureau had removed the citation after an informal dispute resolution appeal. We also noted the bureau had developed “guidelines” for nursing home smoking policies that are not specifically stated in either federal or state requirements. The Life Safety Code, which is the fire and safety code adopted by the Centers for Medicare and Medicaid Services for nursing home surveys, sets minimum requirements for nursing home smoking policies, which are:

1. Smoking is prohibited in any area where flammable or combustible gases or items are used or stored, and the area must be posted with “No Smoking” signs.



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2. Ashtrays of non-combustible materials and safe design must be provided in all areas where smoking is permitted.
3. Metal containers with self-closing covers in which ashtrays may be emptied shall be readily available in all areas where smoking is permitted.
4. Smoking by patients classified as not responsible shall be prohibited, unless the patient is under direct supervision.

Bureau guidelines issued through memorandum set additional requirements for smoking policies, which included requiring nursing homes:

- ▶ Develop tools for evaluating whether residents are responsible to smoke without supervision.
- ▶ Identify how residents will be supervised.
- ▶ Identify the locations and times of when smoking may occur.
- ▶ Identify exceptions to the policy and details of how smoking may occur in those instances.

The bureau cites nursing homes that have not implemented these guidelines. While we acknowledge these guidelines may be good practices and the bureau is enforcing these guidelines to enhance resident care and safety, it did not use the Montana Administrative Procedures Act to adopt the criteria as administrative rules. A CMS representative stated that these guidelines are educational only, and not criteria by which the bureau can cite a deficiency. Similarly, as noted in Appendix A, the majority of nursing home administrators responding to our questionnaire indicated the bureau cites facilities for non-compliance based on factors other than regulation.

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### Deficiency Citations Must be Based on Criteria Formally Established in Regulations

Federal survey guidelines require deficiency citations be based on established regulations. Additionally, section 2-4-201, MCA, the Montana Administrative Procedures Act (MAPA), requires agencies adopt rules of practice used by the agency. Montana law further defines a “rule” as each agency regulation, standard, or statement of

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general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.

Citing deficiencies based on something other than formally adopted regulatory criteria is in non-compliance with federal and state law. Additionally, enforcement of guidelines does not comply with the intent of MAPA, which is to assure public input into regulatory activities, and ensure the regulated community has a definitive source for identifying regulatory requirements.

### **Recommendation #4**

**We recommend the Certification Bureau implement practices to ensure deficiency citations are based only on prescribed rules or laws rather than guidelines.**

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### **Communication With Nursing Homes**

We examined bureau communication and coordination activities with nursing homes. Examination included reviewing bureau documentation, observations of bureau survey activities and interviews with bureau and industry personnel, and reviewing responses to a questionnaire completed by nursing home administrators.

In efforts to improve communication and coordination with the nursing homes, the division and bureau have developed a formal strategy that includes presentations about bureau enforcement activities at nursing home industry conventions, training for nursing home personnel, as well as regular meetings with nursing home industry representatives. Despite these efforts, nursing home personnel and administrators expressed concerns with bureau communication with nursing homes. The following sections address communication during the survey process and between the bureau and the nursing home industry.

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### **Communication During the Survey Process**

Observations of survey activities and responses to our questionnaire indicated surveyors regularly meet with nursing home personnel and

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management during surveys. However, administrators expressed less confidence in the surveyors' efforts or willingness to:

- ▶ Seek out additional information about a potential deficiency, including asking nursing home staff for additional information or clarification.
- ▶ Consider additional information provided by the nursing home demonstrating compliance with the regulations.
- ▶ Assure nursing home management is aware of all potential deficiencies before exiting the facility.

Some administrators also requested surveyors provide more technical or advisory assistance during survey visits. Observations of and interviews with surveyors indicated inconsistencies in the level of assistance provided to nursing homes. While some surveyors appeared more willing to provide suggestions or options for addressing nursing home personnel concerns about care and services, other surveyors were reluctant to provide advice or suggestions to nursing home personnel. Additionally, bureau management interprets federal requirements as stating surveyors are not to provide technical assistance during the survey process.

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### Communication And Coordination Is Essential

Nursing home administrators also indicated the bureau does not keep them informed of changes in regulations or bureau interpretations of regulations. In one instance the bureau changed its interpretation and enforcement of regulations without formally notifying nursing homes of the change. Additionally, 50 percent of the respondents to our questionnaire (Appendix A) stated the bureau does not inform them when the bureau changes how laws and regulations will be interpreted. Less than 50 percent of respondents indicated the bureau is helpful when they ask for assistance correcting deficiencies or interpreting regulations, with approximately 30 percent of the respondents stating the bureau is not helpful. Poor communication limits the regulated community's ability to implement practices and procedures to comply with regulations, which can adversely affect nursing home residents, viability of nursing home facilities, and reduces the credibility of the bureau among nursing home managers.

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### **The Bureau Can Improve Communication and Coordination Activities**

The bureau has relied primarily on informal communication strategies with the nursing home industry, and interviews and agency documents suggest the bureau can clarify communication and coordination opportunities and responsibilities and improve the structure of the survey process to promote communication and coordination. Since communication in its broadest sense is to effect change and encourage the flow of information between organizations, identifying and implementing various methods of formal and informal communication may be necessary to achieve the bureau's goals. Areas for improvement include:

- ▶ Improving surveyor communication with nursing home personnel during surveys, to assure surveyors obtain all relevant information related to potential citations.
- ▶ Increasing structure of the decision-making process during surveys to provide additionally assurance surveys findings are accurately identified, appropriately supported, and presented to nursing home personnel before surveyors leave a nursing home. The bureau could improve structure through development of a decision-making tool that surveyors could use while conducting survey work at nursing homes. The bureau has identified this as an area for improvement and is working to address the issue.
- ▶ Developing controls to assure nursing home industries receive formal notification of changes to bureau interpretations or enforcement of regulations. We noted instances in which the bureau changed interpretations or modified enforcement activities without formally notifying nursing home managers.
- ▶ Establishing bureau policies addressing the scope and nature of technical assistance bureau personnel may provide to nursing homes that conform to federal guidelines. Federal guidelines state explanations of deficiencies may include the action necessary to correct the problem, though surveyors are not responsible for identifying the root causes of deficiencies or determining which corrective action is the most appropriate.
- ▶ Modifying the nature of presentations at nursing home industry conferences. With cooperation from the nursing home industry, the bureau may be able to provide additional training or more detailed information addressing industry questions and concerns.

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- ▶ Continuing division efforts to participate in an on-going dialogue between bureau management and the industry to identify concerns and seek methods for resolving those concerns.

By modifying its formal and informal communication strategies, the bureau can increase assurance industry personnel are aware of and knowledgeable about bureau survey and enforcement activities. However, successfully implementing the any strategies and options will require cooperation from the nursing home industry, including providing the bureau with accurate and timely information about industry concerns and needs the bureau can address within the structure of the Medicare/Medicaid program requirements.

### **Recommendation #5**

**We recommend the Certification Bureau:**

- A. Develop strategies for improving communication during the survey process.**
- B. Develop controls to assure the regulated community receives notice of, and information about, regulatory changes and bureau interpretations of rules and regulations.**



# Appendix A

Audit work included requesting the administrator of each nursing home in Montana complete a questionnaire asking about Certification Bureau survey and enforcement activities. We sent the questionnaire to 102 nursing homes, and received responses from 72 nursing home administrators. The following table presents the questionnaire and aggregate responses from administrators.

	Total Number of Responses	Strongly Agree		Agree		Neither Agree Nor Disagree		Disagree		Strongly Disagree		Don't Know	
1. The Certification Bureau keeps me informed when it makes changes in the way laws and regulations will be interpreted.	70	4	6%	22	31%	9	13%	20	29%	15	21%	0	0%
2. In general, surveyors who visit my facility are:													
a. fair	71	4	6%	31	44%	17	24%	17	24%	2	3%	0	0%
b. are well-trained	69	0	0%	21	30%	26	38%	14	20%	8	12%	0	0%
c. are knowledgeable about laws and regulations governing nursing homes	69	3	4%	30	43%	19	28%	13	19%	4	6%	0	0%
d. conduct thorough surveys	70	2	3%	34	49%	21	30%	9	13%	4	6%	0	0%
e. properly classify deficiencies	69	3	4%	20	29%	7	10%	29	42%	10	14%	0	0%
f. are consistent in how they assess facility conditions	68	1	1%	14	21%	3	4%	26	38%	23	34%	1	1%
3. When surveyors visit my facility:													
a. opportunity is given for daily interaction to discuss surveyor observations	71	12	17%	41	58%	9	13%	4	6%	5	7%	0	0%
b. survey results are communicated in a prompt efficient manner	70	8	11%	32	46%	13	19%	16	23%	1	1%	0	0%
c. opportunity is given to provide additional information relevant to deficiencies cited	70	6	9%	29	41%	13	19%	17	24%	4	6%	1	1%
d. deficiencies are communicated in a prompt, efficient manner	70	5	7%	34	49%	10	14%	18	26%	3	4%	0	0%
e. They conduct an exit conference	71	31	44%	39	55%	0	0%	0	0%	1	1%	0	0%
f. The exit conference accurately addresses TAGs for which the facility is actually cited.	70	6	9%	25	36%	13	19%	17	24%	8	11%	1	1%



## Appendix A

		Total Number of Responses	Strongly Agree		Agree		Neither Agree Nor Disagree		Disagree		Strongly Disagree		Don't Know	
4.	The survey process is effective at identifying significant violations of State laws and regulations.	70	4	6%	23	33%	15	21%	18	26%	10	14%	0	0%
5.	The survey process focuses only on significant issues.	69	0	0%	8	12%	13	19%	26	38%	22	32%	0	0%
6.	The Certification Bureau is helpful when I ask for advice on:													
a.	correcting deficiencies	71	4	6%	28	39%	17	24%	15	21%	7	10%	0	0%
b.	interpreting regulations	71	2	3%	32	45%	18	25%	11	15%	8	11%	0	0%
7.	Tags cited during the survey are based solely on regulations and rules.	68	2	3%	17	25%	14	21%	19	28%	16	24%	0	0%
8.	Of the "G" level and above deficiencies, my facility has received over the past 2 years, all have been properly classified.	60	3	5%	10	17%	23	38%	11	18%	7	12%	6	10%
9.	In my opinion, the Certification Bureau enforces laws and regulations consistently among survey teams.	69	2	3%	9	13%	8	12%	24	35%	23	33%	3	4%
10.	The Certification Bureau takes appropriate action against facilities that don't provide adequate care.	69	5	7%	27	39%	22	32%	7	10%	4	6%	4	6%
11.	The time allowed to make corrective action is generally sufficient.	67	7	10%	45	67%	5	7%	7	10%	2	3%	1	1%
12.	In regard to the Certification Bureau/Quality Assurance Division's process to appeal survey findings:													
a.	I <u>have used</u> the process to appeal the findings of a survey and the process is fair and reasonable.	46	0	0%	15	33%	11	24%	12	26%	8	17%	0	0%
b.	I <u>have not used</u> the process to appeal the findings of a survey and the process is fair and reasonable.	14	1	7%	1	7%	7	50%	0	0%	0	0%	5	36%

	Total Number of Responses	Too Lenient		About Right		Too Harsh							
13. The remedies (sanctions) recommended by the Certification Bureau for noncompliance with laws and regulations are:	65	0	0%	42	65%	23	38%						
14. The federal penalties imposed for noncompliance with laws and regulations are:	65	0	0%	33	51%	32	49%						



## **Bureau Response**

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DEPARTMENT OF  
PUBLIC HEALTH AND HUMAN SERVICES

RECEIVED

JAN 28 2003

LEGISLATIVE AUDIT DIV.

JUDY MARTZ  
GOVERNOR

GAIL GRAY, Ed.D.  
DIRECTOR

STATE OF MONTANA



January 27, 2003

Mr. Scott A. Seacat  
Legislative Auditor  
Office of the Legislative Auditor  
State Capitol, Room 160  
Helena, Montana 59620-1705

Dear Mr. Seacat:

Attached are the Department of Public Health and Human Services responses to the recommendations made during the performance audit of the Nursing Home Surveys function.

We appreciate the effort that has gone into your examination of DPHHS processes and policies and appreciate the thoughtfulness and professionalism displayed by your staff throughout the audit process.

Please contact me if you have questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gail Gray".

Gail Gray, Ed.D  
Director

Cc Marie Matthews  
Mary Dalton  
Carol Bondy



**Recommendation #1**

**We recommend the Certification Bureau:**

- A. Expand recruitment of surveyors to other appropriate professionals.**
- B. Identify and implement alternative incentives for recruiting and retaining qualified staff.**

**Department Response:**

**Partially Concur.**

- A. The Certification Bureau has examined its professional requirements and survey needs extensively over the past year. We have chosen to focus on recruitment of RNs and dieticians for the following reasons: 1) The addition of RNs and dieticians compliments our existing survey staff which is composed of other professional disciplines including social workers, recreation therapists, a respiratory therapist and a pharmacist in addition to RNs and a dietician. 2) RNs have the broad educational background to conduct every aspect of the federally mandated survey process. This ability increases the Department's flexibility in scheduling surveys. 3) Our experience has been that a preponderance of RNs on our survey teams increases our credibility with the nursing home industry, consumers, and advocates. 4) Federal regulations (42 CFR488.314) specify that survey teams must include an RN. No other profession is mandated. 5) The Bureau has also recruited dieticians in the past year because this is a specialty field that we felt we needed more emphasis on after completing an informal internal needs analysis. The Department will continue to re-evaluate the professional requirements of our survey staff on an on-going basis.

**Concur.**

- B. The Certification Bureau will continue to examine its working conditions and examine alternatives that may provide incentives for recruiting and retaining qualified staff.

**Recommendation #2**

**We recommend the Certification Bureau develop and implement a management information system that:**

- A. Increases the bureau's ability to track and monitor the timing of surveys.**
- B. Increases the bureau's ability to schedule and assign staff to maximize resources available for direct survey activities.**

**Department Response:**

**Concur.**

The Certification Bureau will adopt a computerized system for tracking and monitoring surveys and scheduling and assigning staff to maximize resources available for direct survey activities.

### **Recommendation #3**

**We recommend the Certification Bureau:**

- A. Develop a system of controls to increase the accuracy of survey reports and improve the consistency of scope and severity determinations.**
- B. Incorporate information collected from quality control activities into ongoing staff development and training.**
- C. Re-evaluate resource needs, position descriptions, and supervisory responsibilities, and develop strategies for increasing supervision of survey staff.**

### **Department Response:**

#### **Concur.**

Prior to this legislative audit, these areas were identified and targeted internally by the bureau chief and administrator for improvement. Limited resources, a significant vacancy rate, and a hiring freeze have prevented us from fully implementing a quality assurance plan to date. This hiring freeze has been lifted and the Bureau is currently advertising for a supervisor and several surveyors. During the next 9 months, the Bureau will re-examine its quality assurance process and refine it as appropriate. We will set up a systematic method/process for review of IDR outcomes with the surveyors.

### **Recommendation #4**

**We recommend the bureau implement practices to ensure deficiency citations are based only on prescribed rules or laws rather than guidelines.**

### **Department Response:**

#### **Partially Concur.**

The Department agrees that it must cite a federal regulation when a deficiency is cited; we failed to do this in two cases involving smoking policies, in one instance involving the temperature of tap water, and in one instance involving a dietary regulation. In all four of these instances, the facilities were not in compliance with a federal regulation but an interpretive guideline or policy was cited rather than the regulation. Surveyors have been counseled to avoid this error in the future.

The Department disagrees with the assertion that state rules must be adopted to enforce federal guidelines (such as life safety criteria for facility smoking policies) for facilities that participate in both Medicare and Medicaid. All nursing home facilities in Montana are currently dually certified. The Certification program operates under a contract with the federal government to carry out the provisions of Sections 1864, 1874, and related provisions of the Social Security Act. Under this contract, the state makes recommendations to the Center for Medicaid and Medicare (CMS). CMS retains final regulatory authority to accept or reject the state's recommendations.

Any action against dually certified facilities to penalize, suspend, or revoke their Medicare and Medicaid certification is solely the responsibility of the federal government. All appeals of these determinations are processed through federal appeal hearings within the U.S. Department of Health and Human Services. Thus, the actions of DPHHS do not meet the definition a “rule” under the Montana Administrative Procedures Act (MCA 2-4-201) as asserted by the Audit report.

DPHHS does not have any ability to deviate from the federal requirements. Montana citizens have a right to participate and comment upon federal rules when they are adopted at the federal level. State rulemaking cannot change the federal requirements.

The DPHHS contract with the federal government specifies “In the performance of the functions described in this Agreement, the State acts on behalf of the Secretary as a Federal contractor, carrying on for the Secretary, the administrative responsibilities imposed pursuant to law by applying and enforcing Federal standards. The Secretary, however, is the real party in interest in administering the program through this agreement.” The contract further states, “The State shall comply with such regulations and general instructions as the Secretary may prescribe for the administration of this Agreement.” General instructions are described as operating manuals, related written instructions, and guidelines of general application. “In making certifications the State shall apply the appropriate conditions of participation for providers and conditions for coverage for suppliers of services, including standards for life safety from fire, and other requirements incorporated by reference in the regulations. The application of such conditions, standards and requirements shall be in accordance with the nationally uniform survey procedures established in regulations and general instructions.”

Title 42 of the Code of Federal Regulations, part 483.25(h)(2) specifies that a “resident receives adequate supervision” to “prevent accidents.” Section 31-4.4 of the 1985 Life Safety Code requires that “smoking by patients classified as not responsible shall be prohibited” unless the resident is directly supervised. In order to be classified as responsible or not responsible to smoke without supervision, the resident must be assessed. The Department interprets this to mean that the facility must have a policy to ensure that an assessment is completed on every resident who smokes. Safety of residents demands a proactive approach. It is not enough to say that a resident will be assessed. The facility must specify how the assessment will be conducted, who will perform the assessment, and under what conditions the resident will be re-assessed. Section 1-4.3 of the 1985 Life Safety Code gives the state certification fire authority the “final determination whether adequate life safety is or is not provided”. It goes on to explain that this is done because “the Code cannot anticipate every type of building and occupancy configuration.” We would also note that the state’s guideline was reviewed informally by the CMS regional office for applicable use in evaluating facility-smoking regulations prior to their distribution and CMS told us verbally that these guidelines were acceptable.

**Recommendation #5****We recommend the bureau:**

- A. **Develop strategies for improving communication during the survey process.**
- B. **Develop controls to assure the regulated community receives notice of, and information about, regulatory changes and bureau interpretation of rules and regulations.**

**Department Response:****Concur.**

- A. In January 2002, the Certification Bureau formed a work group comprised of nursing home providers, consumer advocates, and provider associations that met four times. The focus of this group is to advise us of where they believe the survey process can be improved. Recommendations from this group will be incorporated into policies and/or rules as appropriate.
- B. The Bureau will develop a process for assuring that nursing facilities receive notice of any changes in federal regulations or interpretations.







